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No. 94-357

In The

Supreme Court of the United States

October Term, 1994

THE STATE OF WASHINGTON, et al.,

Petitioners,

v.

THE SPOKANE TRIBE OF INDIANS,

Respondent.

On Petition For Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, IDAHO, KANSAS, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

i. Should this Court resolve the conflict in the federal appellate circuits by upholding the states' sovereign immunity under the Eleventh Amendment from suit in federal court by Indian tribes?

ii. Does Congress have the power to abrogate the states' sovereign immunity when legislating under its plenary powers in the Indian Commerce Clause?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INTEREST OF AMICI STATES 1

SUMMARY OF ARGUMENT 3

ARGUMENT I.

THE STATES HAVE A VITAL INTEREST IN THIS COURT RESOLVING THE CONFLICT IN THE FEDERAL CIRCUITS 5

ARGUMENT II.

CONGRESS' POWER TO ABROGATE STATE SOVEREIGN IMMUNITY UNDER THE INDIAN COMMERCE CLAUSE IS AN IMPORTANT QUESTION OF FEDERAL LAW NOT SETTLED BY THIS COURT 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Atascadero State Hosp. & California Dept. of Mental Health v. Scanlon, 473 U.S. 234 (1985) 9

Blackfeet Tribe v. Jessup, No. CV-93-031-GF, slip op. (D. Mont. Dec. 23, 1993) 7

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 9, 10

Cheyenne River Sioux v. State of South Dakota, 3 F.3d 273 (1993) 7

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 6

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 9

Delmuth v. Muth, 491 U.S. 223 (1989) 8

Eastern Band of Cherokee Indians v. North Carolina, No. 2:92-CV-239 (W.D. N.C. June 16, 1993) 7

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 8, 11

Fort Belknap Indian Community v. Montana, slip op. No. CV-92-098-GF (D. Mont. Jan. 5, 1994) 8

Green v. Mansour, 474 U.S. 64 (1985) 9

New York v. United States, ___ U.S. ___, 112 S. Ct. 2408 L.Ed. 2d 120 (1992) 12

Pennsylvania v. Union Gas, 491 U.S. 1 (1989) 3, 4, 5, 6, 8, 9, 11

Ponca Tribe of Oklahoma v. State of Oklahoma, ___ F.3d ___, 1994 U.S. App. LEXIS 24084 (Sept. 2, 1994) 7

TABLE OF AUTHORITIES – Continued

Page

Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (1994) 3, 5, 6, 7

Spokane Tribe of Indians v. State of Washington, 28 F.3d 991 (9th Cir. 1994) 6

Welch v. Texas Dep't of Highways, 483 U.S. 468 (1987) 9

Ysleta del Sur Pueblo v. Texas, 852 F.Supp. 587 (W.D. Tex. 1993) 7

CONSTITUTIONAL PROVISIONS

U.S. Const., Article I, § 8, clause 3 ..... 1, 8

U.S. Const., Eleventh Amendment ..... *passim*

U.S. Const., Fourteenth Amendment, § 5 ..... 1, 8, 11

STATUTES

18 U.S.C. § 1166, et seq. 1

25 U.S.C. § 2701, et seq. 1

25 U.S.C. § 2703(4) 2

25 U.S.C. § 2710(d)(3)(a) 12

25 U.S.C. § 2710(d)(7) 12

OTHER AUTHORITIES

Civil Rights Act of 1964 Title VII 11

INTEREST OF AMICI STATES

This case goes to the heart of our federal system of government – the relationship of States of the Union and the Federal Government. At issue is the ability of the federal Congress to displace and dismiss the sovereign interests of the States by subjecting them to suit in federal court to compel them to perform solely *federal* governmental functions. Only this Court is poised to protect vital interests of state sovereignty.

This Court is presented here and in related cases for the first time with the question whether Congress has the power to abrogate the states' sovereign immunity under the *Indian* Commerce Clause, article I, section 8, clause 3 of the United States Constitution. While the power to abrogate has been found in Section 5 of the Fourteenth Amendment and in the *Interstate* Commerce Clause, this Court has not uncovered to date any other provision that permits the Congress to annul the judicial sovereign immunity of the states inherent in the structure and requirements of our federal system of government, and as exemplified in the Eleventh Amendment.

The States of the Union share an immediate and serious concern with the difficult and irregular implementation of a overreaching Act of Congress and the corresponding proliferation of conflicting federal appellate and district court decisions interpreting that Act. Only this Court can resolve these conflicts. These cases arise under the provisions of the Indian Gaming Regulatory Act, Pub.L. No. 100-497, 102 Stat. 2467 (codified at 18 U.S.C. §§ 1166-1168 and 25 U.S.C. §§ 2701-2721) (hereinafter IGRA). Each amicus state has lands (or may have

lands taken in the future by the federal government) that fall within the definition of "Indian lands" under 25 U.S.C. § 2703(4). Each of these states allows or may allow in the future some form of gaming to be operated within its respective borders. The forms of gaming that are permitted, prohibited or regulated differ from state to state, as these are matters solely of state law. Most amici states have been or may become involved in negotiations for tribal-state compacts for gaming to be operated on such lands, as required by IGRA.[1] These negotiations have resulted in highly divergent results from state to state – including, in some states, compacts for Indian gaming operations which are prohibited to the citizens of the state at large. More commonly, the result is lawsuits filed against states in federal court by Indian tribes demanding the states compact for casino gambling even where it is criminally prohibited. While it is in the latter category that this particular suit arises – in the State of Washington – other states similarly situated fear the same federal court compulsion to permit that which they criminally prohibit. This Court already has before it the petitions and cross-petitions of the States of Alabama and Florida, and likely will see those of Oklahoma, Kansas, and New Mexico. The states are witnessing the serious degradation of their jurisdiction under this Act of Congress and possess a vital interest in having this Court protect state sovereignty.

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[1] Amici states Maine, Massachusetts and Rhode Island contend they are not subject to IGRA, based on their respective Indian land claims settlement acts.

Amici States now face the prospect in certain federal circuits that they may be subjected to suit in federal court without their consent and against their will by Indian tribes in violation of the Eleventh Amendment to the United States Constitution, compelling them to perform acts which the Congress can not lawfully require under the Tenth Amendment.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding that Congress has the power to abrogate the state's Eleventh Amendment immunity when legislating under the Indian Commerce Clause is at odds with the holding of the Eleventh Circuit in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (1994), that Congress has no such power. Certiorari should be granted to resolve conflicts between the Eighth, Ninth, Tenth and Eleventh Circuits, as the varying and disparate interpretation and application of the Indian Gaming Regulatory Act of 1988 ("IGRA") by the federal courts has left states with no guidance with respect to the Act. Resolution of these questions is of profound consequence to the states concerned.

The federal circuits have differed sharply on their reading of and the arguable application of *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), to cases involving federal legislation under the Indian Commerce Clause. In that case, this Court held that Congress may abrogate state sovereign immunity based on its *Interstate* Commerce Clause power; the Ninth Circuit, however, read the power as derived from the Commerce Clause as a whole,

and thus, applied *Union Gas* to Indian Commerce Clause legislation. The States have a vital interest in protecting their sovereign immunity against further encroachment by the federal legislation that subjects them to suit in federal court, and argue that this Court should grant certiorari in order to settle the question whether Congress can freely abrogate state sovereign immunity under the Indian Commerce Clause.

The States also argue that this Court has only upheld the congressional abrogation of state sovereign immunity where Congress' power to enact legislation under the constitution would be incomplete without subjecting states to suit in federal court. IGRA presents no such cause or necessity to subject states to suit by Indian tribes in order to accomplish its regulation of Indian gambling, a matter under its complete and plenary authority over Indian affairs under the Constitution. As argued, Congress sidestepped federal regulation of these matters and instead enacted a scheme that coerces the States to carry out a federal regulatory scheme as if the States were mere subdivisions of the national government. IGRA's compulsion of the States to negotiate tribal-state gambling compacts and its sanction of a lawsuit in federal court by Indian tribes to compel the negotiations and compacting is a definitive example of a Tenth Amendment violation enforced by an Eleventh Amendment violation.

ARGUMENT

I

THE STATES HAVE A VITAL INTEREST IN THIS COURT RESOLVING THE CONFLICT IN THE FEDERAL CIRCUITS

The holding by the Ninth Circuit that Congress has the power to abrogate the state's sovereign immunity under the Indian Commerce Clause is at odds with the holding of the Eleventh Circuit in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (1994), that Congress has no such power. That disparity gives three states – Alabama, Georgia and Florida – the benefit of a rule that bars Indian tribes from suing these states under IGRA in federal court without their consent, while the eight states with Indian tribes in the Ninth Circuit – Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon and Washington – live under a different rule established in this case and stand subject to suit under the provisions of IGRA without the states' consent. Additionally, states in the Eighth and Tenth federal appellate circuits are subject to the same rule now found in the Ninth Circuit. The same issue is pending in the Fourth and Fifth Circuits. This disparity in the application of the same federal law is of profound consequence to the states concerned. Such a conflict among the circuits is within the scope and character of the reasons for granting certiorari in Supreme Court Rule 10.1(a). Indeed, the conflict can only be resolved by this Court.

The Ninth Circuit concluded here that the plurality decision in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989),

held that Congress may abrogate state sovereign immunity based on its Commerce Clause power as a whole, not restricted to the *interstate* prong. *Spokane Tribe of Indians v. State of Washington*, 28 F.3d 991, 996 (9th Cir. 1994). This reading of *Union Gas* differs sharply from that of the Eleventh Circuit in *Seminole, supra*, where the court noted that the *Union Gas* Court in each of its opinions – plurality, concurrences and dissents – addressed only the *Interstate* Commerce Clause. 11 F.3d at 1027. States heartily agree with the Eleventh Circuit's reading, given the express reference to the interstate prong in the plurality opinion in *Union Gas*, 491 U.S. at 15, and the rationale of the opinion, going to the regulation of commerce among states.

Additionally, the Ninth Circuit concluded that the *Union Gas* rationale that finds congressional power to abrogate state sovereign immunity extends equally to the Indian prong of the Commerce Clause because that clause embodies a plenary power of the Congress that limits the power of the states. *Spokane*, at 996-997. The Ninth Circuit lightly dismisses the discussion by the Eleventh Circuit of the unique qualities that distinguish the Interstate Commerce Clause and the Indian Commerce Clause. The *Seminole* court aptly noted

> In [*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192], the Court acknowledged the plenary powers under the Interstate Commerce Clause that allow Congress to place limits on the states [was] in order to "maintain[ ] free trade among the States." *Id.* By contrast, "the central function of the Indian Commerce Clause is to provide Congress with power to legislate in the field of Indian affairs. *Id.* Although Congress

> has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate they be treated distinctly.

11 F.3d at 1027. These sharply different readings of the *Union Gas* opinion and the diametrically opposed conclusions as to abrogation power under the Indian Commerce Clause leave the states with no guidance as to whether suits by tribes against the states, without the consent of the states, are jurisdictionally barred or not.[2]

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[2] The Eighth and Tenth Circuits also present a conflict with the Eleventh Circuit on this same issue. In *Cheyenne River Sioux v. State of South Dakota*, 3 F.3d 273 (1993), the Eighth Circuit relied on the decision of the district court in *Seminole Tribe of Florida*, reversed by the Eleventh Circuit, for the notion that the Indian Commerce Clause provided the congressional power to abrogate the states' sovereign immunity. 3 F.3d at 280-81. Additionally, the Tenth Circuit has similarly found a congressional power to abrogate state sovereign immunity under the Indian Commerce Clause simply because Congress has plenary power under that clause. *Ponca Tribe of Oklahoma v. State of Oklahoma*, ___ F.3d ___, 1994 U.S.App. LEXIS 24084, filed Sept. 2, 1994, slip op. at 20, 10th Cir. Nos. 92-6331, 93-2018, 2020, 3110, consolidated on appeal with *Pueblo of Sandia v. New Mexico*, *Apache Tribe of Mescalero Reservation v. New Mexico*, and *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas v. Kansas*.

Revealing the many conflicts in the federal district courts are the following cases pending in the circuit courts: *Eastern Band of Cherokee Indians v. North Carolina*, No. 2:92-CV-239, slip op. (W.D. N.C. June 16, 1993) (granted motion to dismiss on Eleventh Amendment grounds), *appeal docketed*, No. 93-1936 (4th Cir. 1993); *Ysleta del Sur Pueblo v. Texas*, 852 F. Supp. 587 (W.D. Tex. 1993) (denied motion to dismiss on Eleventh Amendment grounds), *appeal docketed*, Nos. 93-8823 &-8477 (5th Cir. 1993); *Blackfeet Tribe v. Jessup*, No. CV-93-031-GF, slip op. (D. Mont. Dec. 23, 1993) (granted motion to dismiss on Eleventh

II

CONGRESS' POWER TO ABROGATE STATE SOVEREIGN IMMUNITY UNDER THE INDIAN COMMERCE CLAUSE IS AN IMPORTANT QUESTION OF FEDERAL LAW NOT SETTLED BY THIS COURT

Amici States also have a vital interest in the resolution of the question presented by the Ninth Circuit, as it goes to the fundamental relationship of the States with the Federal Government, presenting important questions of federalism. This Court has not been presented with, and thus, has never settled the question whether Congress has the power to abrogate the states' sovereign immunity under the Indian Commerce Clause, article I, section 8, clause 3 of the U.S. Constitution. To date, this Court has found Congress' power to abrogate only in Section 5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) and in the *Interstate* Commerce Clause, *Union Gas, supra*. The significance of finding yet another constitutional provision that gives the Congress power to abrogate state sovereign immunity cannot be understated – it would lead to a critical undermining of our federal system of government, further strengthening the power of the federal government at the expense of the states. *Delmuth v. Muth*, 491 U.S. 223, 227-28 (1989). The resolution of this question, then, falls within the scope and character of the reasons for granting certiorari under Supreme Court Rule 10.1(c).

Amendment grounds), *appeal docketed* No. 94-35079 (9th Cir. 1994); and *Fort Belknap Indian Community v. Montana*, slip op. No. CV-92-098-GF (D. Mont. Jan. 5, 1994) (granted motion to dismiss on Eleventh Amendment grounds), *appeal docketed* No. 94-35126 (9th Cir. 1994).

This Court has recognized that the Eleventh Amendment generally bars suits against a state by an Indian tribe. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 2581-83 (1991). The Eleventh Amendment is only emblematic of the states' sovereign immunity, which is itself "part of the understood background against which the Constitution was adopted, . . . " *Union Gas*, 491 U.S. at 32 (Scalia, J., concurring in part and dissenting in part); *see also Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 487 (1987). Before Congress can effectively abrogate a state's sovereign immunity, it must have constitutional authority to do so. *Green v. Mansour*, 474 U.S. 64, *reh'g denied* 474 U.S. 1111 (1985) ("States may not be sued in federal court unless . . . Congress, *pursuant to a valid exercise of its power*, unequivocally expresses its intent to abrogate the immunity." Emphasis added.); *Blatchford, supra*, 111 S.Ct. at 2584 ("Our cases require Congress' exercise of the power to abrogate state sovereign immunity, *where it exists*, to be exercised with unmistakable clarity." Emphasis added.). *See also Atascadero State Hosp. & California Dep't of Mental Health v. Scanlon*, 473 U.S. 234 (1985); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). The *Blatchford* court had no occasion to consider in that case whether Congress had the power to abrogate as it found no statutory expression of clear and unequivocal intent to abrogate; the Court did not need to reach the question of the existence of the congressional power. 111 S.Ct. at 2584 ("power to abrogate . . . *where it exists* . . . ").

Blatchford, however, did address whether there was a *waiver* of state sovereign immunity "inherent in the plan of the convention," and concluded

> [T]here is no compelling evidence that the Founders thought such a surrender [of sovereign immunity] inherent in the constitutional compact. [. . .] What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States [citation omitted], as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 111 S.Ct. at 2582-83, emphasis in original. While this holding on waiver does not answer directly whether Congress has the power to *abrogate* state sovereign immunity under its plenary powers in the Indian Commerce Clause, it is a compelling *indirect* answer that Congress does not have that power. When the States compacted with a federal government and gave certain powers over to it, reserving others, how could the States have contemplated Congress nullifying that immunity which they did not surrender for the benefit of Indian tribes?

To suggest that Congress may freely abrogate state sovereign immunity pursuant to any plenary power given it in the Constitution misses the point of judicial immunity. Even where this Court in a plurality opinion, joined by Justice White concurring in the result, upheld the congressional power to abrogate state sovereign immunity under the Interstate Commerce Clause, it did

so only *"because the congressional power would be incomplete without the authority to render the States liable in damages, . . . " Union Gas,* 491 U.S. at 19-20; emphasis added. In other words, the power to abrogate was found to exist only because Congress found it *necessary* to render the states liable in federal court in order to accomplish its purpose in legislating under the Interstate Commerce Clause. *Union Gas* considered Congress' enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), providing means to clean up hazardous waste sites throughout the country. The Act provided who would be liable for the cost of remedial action, and Congress, legislating under the Interstate Commerce Clause, found it was *necessary* to hold the states financially accountable for certain costs of this remedial action. The remedial action would be incomplete without making the states liable *in federal court.*

Similarly, in *Fitzpatrick,* as in *Union Gas,* Congress could not enforce Title VII of the Civil Rights Act of 1964 without making the states, as employers, *liable in federal court* for damages and attorneys fees for unlawful employment discrimination. *Fitzpatrick,* 427 U.S. at 456 ("Congress may . . . provide for private suits against States or state officials which are constitutionally impermissible in other contexts."). Thus, the power to abrogate arises only where Congress's power when legislating pursuant to Section 5 of the Fourteenth Amendment or the Interstate Commerce Clause is incomplete without subjecting states to suit in federal court.

Here, the critical question which needs to be settled by this Court is whether the Congress, in passing IGRA,

had the power under the Indian Commerce Clause to abrogate state sovereign immunity. Amici States contend this question can only be settled by examining whether it was necessary to subject a state to suit in federal court by an Indian tribe in order to accomplish Congress' purpose in regulating Indian gaming. As is evident, however, Congress has plenary and absolute power in Indian affairs and states are not essential to that power. Nor can Congress compel states to aid what the federal government may do solely within its power by having them implement a federal regulatory process, *New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992), as if the States were mere subdivisions of a national government. Because Congress is granted plenary power in Indian affairs, and its power thereunder is not incomplete without authority to compel the States to do its bidding in Indian matters, then it is without such power altogether.

In fact, Congress could have provided for the *federal* regulation of Indian gaming, wholly apart from any involvement by the states, coerced or voluntary. Instead, Congress chose to compel the states to negotiate tribal-state compacts under 25 U.S.C. § 2710(d)(3)(a); subject them to being hauled into federal court under a claim that they failed to negotiate in good faith under 25 U.S.C. § 2710(d)(7); subject them to the compulsion of a federal court order to further negotiate; subject them to compulsion to submit differences to mediation; and subject them to compulsion to submit last best offers to a court-appointed mediator and make a selection from the mediator. 25 U.S.C. 2710(d)(7).

Therefore, the States are presented with a perplexing and unpalatable set of conditions: if the Ninth Circuit ruling is upheld, states will continue to be subjected to lawsuits by Indian tribes they may not sue themselves, which lawsuits are solely to compel the states to perform acts that are not within their scope of affairs and which are wholly within the scope of the federal government's plenary powers. Because subjecting the States to suit by Indian tribes in federal court is not essential to the power of the Congress to provide for Indian gaming, Congress has no power to abrogate the state's Eleventh Amendment immunity. Under the Ninth Circuit's reasoning that any plenary power in the Congress gives rise to a power to abrogate state sovereign immunity, a constitutional wall has been reduced to a statutory hurdle and the Eleventh Amendment is rendered superfluous.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari filed by the State of Washington should be granted.

Respectfully submitted,

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